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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

SEP 20 2000

File: WAC-98-132-52940 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a subsidiary of its parent company engaged in international trading and wholesaling. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

8 CFR 204.5(j)(3) states:

(i) *Required evidence.* A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

At issue is whether the beneficiary has been and will be performing in a managerial or executive capacity.

8 CFR 204.5(j)(5) states:

Offer of employment. No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In her decision, the director noted that although the beneficiary was transferred to the U.S. entity in July 1995, the U.S. entity has only the following three employees: the beneficiary as president; a manager of the trading department; and a business manager/corporate secretary. The director further noted that the beneficiary had been primarily performing the operational duties of the U.S. entity.

On appeal, the manager of the trading department describes the beneficiary's duties in part as follows:

...developing our administrative, management and business

policies; establishing intercompany operation procedures and systems between our company and our [redacted] parent company; directing the networking with US manufacturers and suppliers for business opportunities; overseeing and final approving the negotiation, engagement and performance of business contracts with US and [redacted] companies; overseeing the coordination of business, financial and administrative transactions between our company and our [redacted] parent company; developing corporate financial and budgetary systems, procedures and policies with accounting assistance from professional services; as well as interviewing and hiring employees. In essence, he is the head [redacted] who establishes, manages and refines the general policy and framework of our company.

The manager of the trading department also states that the U.S. entity has recently hired a shipping manager and a trading & shipping clerk, and further describes the U.S. entity's staffing as follows:

Jing Li had a staff of three when [the beneficiary's] I-140 petition was filed in April. As a trading company, this staffing level in our early existence of two-plus years was generally considered as normal in our industry. Our organization structure was very clearly defined as originally laid down by [the beneficiary] and it had allowed him to function in a managerial or executive capacity. The various tasks we encountered in our daily operation, such as marketing to China, procurement within the US, trading and shipping paperwork, accounting, etc. were all channeled to the appropriate departments because each of our employees or contractors has his or her own specialty that makes up our overall operation in international trading and wholesaling. Those tasks were also mostly professional in nature requiring college education or requisite work experience in the trading industry.

Specifically, under the supervision of [the beneficiary], our Manager of Business Department [redacted] has been carrying out daily activities in marketing, procurement, negotiation, and networking. Our Manager of Trading Department [redacted] has been handling the coordination and paperwork for trading and shipping transactions. Our accounting contractor [redacted] has been preparing our tax reporting and financial data compilation. As discussed above, [the beneficiary's] trivial involvement in operation during our early days was limited to occasions where he had to demonstrate [to] an employee how certain tasks should be approached or where he had to make an important business decision (such as making an offer to another company). While our size was compact in the early days, our staffing level and organizational hierarchy were set up to be such that [the

beneficiary] could function in a managerial or executive capacity as our President.

Of particular importance, [the beneficiary] will not only remain the highest executive of our company, but he is also the *sole* and critical link between [redacted] and our parent company in [redacted] Only he came from the Chinese parent company as a L-1 executive while the rest of our employees were all hired locally in the United States.. [redacted] cannot logically and practically continue to exist and operate as a "subsidiary" without any connection to the parent company.

The record indicates that the U.S. entity was incorporated on January 13, 1995, and the petitioner has been employed in L-1A status in the U.S. entity since July 1995. The present petition for an extension was filed on April 9, 1998. Information on the petition indicates that the U.S. entity has three employees. Although the manager of the trading department states on appeal that two additional employees have been recently hired, Title 8 C.F.R. 103.2(b)(12) states that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

The U.S. entity's quarterly tax return for the period ending on March 31, 1998, reflects the following three employees and quarterly earnings: the beneficiary, $6,000; the manager of trading department, $2,400; and manager of business department, $2,100. Such earnings reflect the following annual earnings: $24,000 for the beneficiary, $9,600 for the manager of the trading department; and $8,400 for the manager of the business department. As the U.S. entity's 1997 corporate tax return reflects only $18,000 in salaries and wages paid, the petitioner does not demonstrate that the beneficiary has a sufficient subordinate staff to perform the U.S. entity's operational duties. It is further noted that the amount of the wages of the beneficiary's two subordinate managers coupled with the fact that they have no subordinate employees seem to indicate that such employees are managerial in title only. Although the trading department manager argues that a contractor has been handling the U.S. entity's tax reporting and financial data compilation, the 1997 corporate tax return reflects a total of $600 paid in legal and accounting services. It is not clear how much of that amount was paid for accounting services, but it appears to be minimal. As such, the evidence does not establish that the U.S. entity contains the organizational complexity to support a position that is primarily managerial or executive in nature.

Upon review of the record, the petitioner has not sufficiently demonstrated that the beneficiary functions or will function at a senior level within an organizational hierarchy other than in

position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been and will be performing in a primarily managerial or executive capacity. There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.